RECEIVED

OCT - 2 1996

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

MOTION OF THE RURAL TELEPHONE COALITION FOR STAY PENDING JUDICIAL REVIEW

October 2, 1996

TABLE OF CONTENTS

SUMMARY

This motion seeks a stay of the burden of proof rule and standard that apply in state inquiries to terminate the rural exemption, the rule that requires LECs to file preexisting ILEC to ILEC arrangements and the "most favored nation" rule that requires ILECs to make these preexisting agreements available to any requesting carrier.

The RTC seeks a limited stay pending judicial review. A stay is necessary to prevent irreparable injury to the rural telephone companies that are members of the associations and to protect the public interest, including the public in the rural areas served by the companies.

There is a high probability that the RTC will prevail on the merits in an appeal challenging the validity of these specific rules. In each instance, the Commission has acted arbitrarily and capriciously in promulgating the specified rules. It has unilaterally amended the standard required to be considered in state inquiries related to the termination of the rural exemption. The statute refers to three factors relevant to terminating a rural exemption. One factor is a requirement that the request have an "unduly economically burdensome" effect. Rewriting this statutory factor, the Commission's rule requires that a rural telephone company carry the burden of showing that a termination of the exemption will likely cause the company undue economic burdens beyond the economic burdens typically associated with efficient entry. The Commission's rule also fails to consider technical feasibility and universal service, two other factors specifically mentioned in the statute. Finally, in its qualification of "unduly economically burdensome" the FCC failed to give public notice of its intent to promulgate such a rule.

The Commission also went beyond the scope of its authority in enacting a rule requiring ILECs (a) to file preexisting agreements that, among other arrangements, including neighboring ILEC extended area service and signalling agreements and (b) to make their individual terms available a la carte to competing carriers. In doing so, the Commission eviscerated the infrastructure sharing provisions in the Act.

These specific rules will cause irreparable injury to the rural telephone companies that are members of the RTC associations. Many will lose their exemptions in states applying the Commission's rules, that would not have under the standards set forth in the statute. Immediately, these companies must begin to expend some management resources and incur consulting costs that may not be recoverable or that ultimately will be borne by rural consumers not served by new entrants. The incurrence of these costs is wasteful and harmful to the public interest. These companies and their customers are also likely to lose the benefits of arrangements made before enactment with non-competing neighboring ILECs for shared provision of services. The Commission has effectively written section 259 on infrastructure sharing out of the Act. The public will also not be served by the enforcement of these extremely intrusive rules during the pendency of litigation. Stability and a smooth transition to the changes lawfully required by the Act are more conducive to the public interest than is the immediate effectiveness of rules that will likely change following judicial review.

RECEIVED

OCT - 2 1996

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

MOTION OF THE RURAL COALITION FOR STAY PENDING JUDICIAL REVIEW

INTRODUCTION

The Rural Telephone Coalition ("RTC") hereby requests a stay pending judicial review of §§ 51.303, 51.405 and 51.809 of the Commission's rules promulgated in the Commission's First Report and Order, FCC 96-325, released August 8, 1996 and published in the Federal Register on August 29, 1996.[1]

The Rural Telephone Coalition ("RTC") is comprised of the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA"), and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"). The Coalition was an active participant in the proceeding before the Commission, filing comments and replies on numerous issues that affect members of the associations.

[1] The RTC has filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit.

The United States Court of Appeals for the Eighth Circuit temporarily stayed the First Report and Order in *Iowa Utilities Board v. FCC,* No. 96-3321 on September 27, 1996. The motions for stay in that consolidated proceeding did not address the specific FCC rules the RTC addresses here.

DISCUSSION

I. THE COMMISSION SHOULD STAY 7 C.F.R. § 51.405.

A. Petitioners are Likely to Prevail on the Merits.

1. Application of an Incorrect Standard

The rule adopted in 7 C.F.R. § 51.405 (a) places the burden of proof on a responding "rural telephone company" instead of the petitioner in the State commission exemption termination proceedings established under 47 U.S.C. § 251(f)(1). Further, in conjunction with this burden, 47 C.F.R. § 51.405(c) requires a "rural telephone company" to make a showing that application of the interconnection requirements in Section 251(c) would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry. A stay of these provisions is warranted under each of the criteria established in *Washington Metropolitan Area Transit Commission v. Holiday Tours,* 559 F.2d 841, 843 (D.C. Cir. 1977).

The Commission has misinterpreted section 251 of the Act and acted arbitrarily and capriciously in substituting a new standard for a rural telephone company to maintain its section 251(f)(1) exemption. The RTC meets the first test of *Holiday Tours* as it is likely to prevail on the merits in an appeal of this aspect of the interconnection rules. Section 251(f)(1) (A) bestows on each rural telephone company an automatic exemption from the obligations imposed on incumbents in section 251(c) until (1) it receives a bona fide request for interconnection, services, or network elements, and (2) the State Commission determines that the filed bona fide request is not unduly economically burdensome, is technically feasible and is consistent with most of the universal service provisions in Section 254.[2]

The Order's treatment of exemptions, modifications and suspensions interjects the Commission into a process from which Congress deliberately excluded it. The House telecommunications bill, H.R. 1555, gave this Commission the duty to waive the interconnection requirements for rural LECs.[3] The Senate vehicle, S.652, split waiver and modification authority between this Commission and the states for mid-size and smaller LECs and required the Commission or a state to "waive or modify" interconnection requirements for rural LECs.

The Conference Committee version that is now the law deleted this Commission's authority over interconnection relief entirely, giving both rural exemption and modification or suspension authority solely to the state commissions in section 251(f)(1) and (2). Notwithstanding the unmistakable intent of Congress to bypass the FCC, the Order purports to exercise federal authority to (a) graft a burden of proof onto the Act, (b) change the standard

---

[2] Consistency is required with all but the open ended and discretionary subsections (b)(7) and (c)(1)(D) of Section 254. These subsections, respectively, permit the Joint Board and Commission to consider the public interest, convenience, and necessity in formulating universal service policy and an evolving definition of the services supported by Federal universal service support mechanisms.

[3] House Rep. 104-204 (Part 1), 104th Cong. 1st Sess. (1995), pp. 74-75. The House Report stated that mandatory waivers for rural LECs would spare them the costs of seeking waiver before the FCC, but provided for "future" termination when conditions had changed (ibid.).

for rural LEC relief and (c) decree that Congress meant the automatic exemption only as exceptional relief.[4]

The Order seems at first to recognize (¶¶ 1252-53) that section 251(f) automatically "grants" rural LECs an exemption from substantial obligations applied to ILECs in general by section 251(c), and that state authority is paramount. The Order also gives lip service (¶ 1262) to the Congressional intent to spare small and rural LECs from inappropriate requirements. The Order nevertheless drops the pretense of deferring to the states and Congress to assert (¶ 1262) that Congress really intends section 251(c)'s requirements "to be the exception, rather than the rule. . . ." Mistakenly confusing relief from costly and burdensome unbundling, interconnection and access requirements with "insulating smaller or rural LECs from competition" (¶ 1262), the Commission contrived a markedly different economic-impact standard from what Congress enacted. The Act requires a state commission determination that a specific bona fide request "is not unduly economically burdensome," section 251 (b)(1)(A). The Commission has substituted a requirement for evidence "that application of those requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry." Order, (¶ 1262) [emphasis added].

---

[4] Although the Order (¶ 1250) points out differences between section 251(f)(1), the exemption, and (2) the modification provision, including their economic impact standards, the Order makes the same error as to both by rewriting the economic impact standards in both to reflect the same, much stricter, standard.

Petitioners are likely to prevail on the merits by showing that the Commission erred in substituting for the tripartite measure of section 251(f)(1) a single requirement.[5] That requirement, an aberration from the statutory "unduly economically burdensome" test, puts on the rural telephone company the burden to show that it will suffer extraordinary undue economic burdens beyond those typically associated with competitive entry (hereafter, the "extraordinary undue economic burden"). The statute requires a finding of undue economic burden, but would also enable a state to determine that "efficient competitive entry" would cause an undue burden. The Commission has no authority to intrude upon the prerogatives of the state commission with any rules regarding section 251(f), let alone incorrect rules.[6] But even assuming arguendo such jurisdiction the Commission has no authority to ignore or amend elements for the statutory standard. Congress did not provide it the discretion to add to or subtract from the standard to mold interconnection relief to its own preferences. The Commission ignores the section 251(f)(1) technical feasibility requirement altogether; but the statute permits a state to deny termination of a rural telephone company's exemption if the proposal before it is technically infeasible. Furthermore the statute plainly contemplates that, in appropriate circumstances, a

---

[5] Section 51.405 of the Rules states only one standard for determinations under § 251(f)(1) or (2), whereas the Act mandates three holdings to support terminating the exemption. Even if the Order and section 51.405 could be construed as an addition to the statutory requirements instead of a substitution, the effect would nevertheless be an unauthorized derogation of the statutory protection afforded rural telephone companies.

[6] The RTC generally agrees with the jurisdictional arguments set forth in the Motion for Stay of the Florida Public Service Commission, filed in *IUB v. FCC*, No. 96-3321, (U.S.C.A. 8th Cir. 1996). The plain language of sections 251 and 252 also provides only limited, but explicit, authority in the few instances where Congress intended Commission rulemaking.

state may find that universal service may be harmed by "burdens typically associated with efficient competitive entry."

The effect of the "extraordinary undue economic burden" standard is to eliminate the presumptions contained in the exemption. There would have been no need for Congress to create an exemption if it had concluded that all areas of the country were equally ripe for the introduction of competition. The Congressional objective extended beyond competion itself to include the longstanding goal of preserving universal service in all areas of the country. This goal necessarily acknowledged differences among rural, high cost and urban areas. State determinations will ultimately involve the statutory standards in section 254, as well as the rules and mechanisms the Joint Board recommends and the Commission adopts to implement Section 254. The statute requires that these rules be based on principles that, among other things, insure that consumers in rural and high cost areas have access to telecommunications services, including advanced services. The Commission's "extraordinary undue economic burden" standard completely ignores these considerations. Besides, section 251(f), other portions of the Act recognize rural differences and account for them by including measures that require or permit State commissions to consider the effects of competition on universal service. For example, under section 214(e)(1), a State commission can require a competitor to meet requirements for designation as an eligible telecommunications carrier in markets served by rural telephone companies. In addition, section 253(b) empowers state commissions to impose on competitors " requirements necessary to preserve and advance universal services."

2. The Burden of Proof

The Commission also erred in its decision to impose a "shifted burden of proof" rule dictating what procedures apply in State commission inquiries. Congress did not intend the Commission to impose on states burden of proof requirements that do not exist in the statute. A proceeding to consider termination of an exemption can only be initiated by the filing of a request or petition with the State by the party making a bona fide request for interconnection, services, or network elements.[7] Upon receiving the request or petition, section 251(f)(1) (B) requires a State Commission inquiry, which must be completed 120 days after the State receives notice of the request.

Neither subparagraph (A) nor (B) contains language authorizing the adoption of rules shifting the burden of proof from the petitioner to the responding "rural telephone company" and changing the statutory standard that the State commission must apply in deciding whether termination of an exemption is appropriate. Further, these subparagraphs do not otherwise imply that a State commission is required to abandon its procedural rules in conducting inquiries under section 251(f). Nothing in section 251(f)(1)(A) even vaguely hints at a Congressional intent to require that rural telephone companies bear the burden of proof to make the "undue economic burden" (let alone an "extraordinary undue" burden) showing each time they respond in a State inquiry initiated by a party requesting interconnection. The exemption is the status quo which is not to be disturbed until a bona fide request is received and the State commission makes a

[7] Section 251(f)(2), on the other hand, requires a petition of "rural carrier" with fewer than 2% of the access lines nationwide. Section 251(f)(1), the rural exemption, applies to a narrower class of "rural telephone companies" defined in 47 U.S.C. § 153(37).

determination on the request in light of the statutorily enumerated public interest factors. The party seeking a change in the status quo ordinarily sustains the burden of justifying the change.[8]

The Commission bases its burden of proof rule on the summary conclusion that "it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements." The "otherwise applicable requirement" that governs a "rural telephone company" is the exemption that it is entitled to keep until proper findings have been made under Section 251(f)(1)(A). Consequently, this conclusion makes no sense in the context of exemption inquiries. Rural telephone companies do not petition or seek relief in exemption inquiries. They are exempt by virtue of belonging to the defined exempt class-rural telephone companies. The statute requires a bona fide request or petition to the State by the party seeking interconnection.

Rural companies are not seeking a waiver from applicable laws. The termination proceedings are thus unlike waiver applications and are not governed by the rule in *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). In any event, Congress was aware of *Wait*, as it preexisted the 1996 Act, and Congress chose not to adopt a waiver proceeding here. The stiffer "extraordinary undue economic burden" standard is reminiscent of the Senate Report's description of the "2% waiver" provision in S. 652. However, the enacted rural LEC relief provision has been (a) strengthened from a "waiver or modification" for rural LECs to the automatic exemption, and (b) replaced by the clear and unambiguous "not unduly economically burdensome" standard, which is reiterated in the Conference Report (p. 122). Thus, a reviewing court is highly likely to find the Order arbitrary, capricious and contrary to law for usurping state authority and scrapping the Act's stated standard -- a "not unduly

[8] 29 AM. JUR. 2D *Evidence § 158* (1995).

burdensome" determination -- in favor of the Commission's own -- proven likelihood of extraordinary impact.

The Commission's burden of proof rule even contradicts its own General Rules of Practice and Procedure. The norm established in those rules places both the burden of proof and the burden of going forward with the evidence on the petitioner or applicant rather than the respondent. The rule provides:

§ 1.254 Nature of the hearing; burden of proof.

> Any hearing upon an application shall be a . . . hearing. . . in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission as well as the burden of proof upon all such issues, shall be upon the applicant except as otherwise provided in the order of designation.

The Commission's burden of proof rule is also inconsistent with the Administrative Procedure Act ("APA"). Section 7(c) of the APA provides that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[9] The "burden of proof" as used in the Administrative Procedure Act means the burden of persuasion and not only the burden of production.[10] Under section 251(f)(1)(B) the proponent is the party who initiates a State commission inquiry by submitting to that commission a notice of its bona fide request to a rural telephone company. The Commission has totally ignored not only its own rules on the burden of proof, but also the administrative law it would be required to follow if it had no rule of practice or procedure relating to the burden of proof. The Commission's imposition of a conflicting burden of proof is arbitrary and capricious in the absence of any statutory authority to impose on

---

[9] 5 U.S.C. § 553.

[10] *Director, Off. of Workers' Compensation Programs v. Greenwich Collieries,* 114 S.Ct. 2251 (1994).

the states a rule that contradicts Commission policy and the administrative procedures federal agencies must use.

3. Lack of Notice

The Commission also violated the APA by adopting the "shifted burden of proof" and "extraordinary undue economic burden" rules without complying with the notice and comment procedures mandated by section 553 of the APA. Its failure to give notice of the burden of proof rules and its substitution for the statutory standards makes it further likely that petitioners will prevail on the merits. Rules allocating the burden of proof are substantive and require compliance with section 553 prior to promulgation.[11] Substantive standards also require notice. Section 553(b)(3) requires an agency to include the "terms or substance of the proposed rule or a description of the subjects and issues involved" in its notice of the proposed rule. The Commission's rules dictate what must be in the Section 553 notice to the public. They state that the notice should include " either the terms or substance of the proposed rule or a description of the subjects and the issues involved."[12] The Commission made no mention of a proposed burden of proof rule or modified standards anywhere in its Notice of Proposed Rulemaking. Only two parties even mentioned the idea of a "shifted burden of proof" in their filings. Their comments do not suffice as notice.[13] However, the comments illustrate that the Commission had no basis for its finding that either the shifted burden of proof rule or the "extraordinary undue

---

[11] *American Dredging Co. v. Miller, 510 U.S.* 443, 453 114 S. Ct. 981, 988, 127 L. Ed.2d 285 (1994). Sometimes, a notice of proposed rulemaking is not required for procedural rules. 5 U.S.C. § 553(b)(3)(A).

[12] 47 C.F.R. §1.413.

[13] *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir 1995).

economic burden" standard is required. The Small Cable Business Association in a four sentence passage vaguely suggested that the burden of proof should be placed on a rural telephone company in exemption hearings under section 251 (f)(1).[14] The comments of Vanguard Cellular Systems, Inc. ("Vanguard") confuse exemptions with suspensions and modifications, suggesting that "rural carriers" should bear the burden of proof to show that they are entitled to "exemptions"[15] as if § 251(f)(1) and (2) involved only one form of relief and one standard. Vanguard's comments miss the point that "rural telephone companies," and "rural carriers" are distinguishable, as are the procedures for (a) terminating the exemption of a "rural telephone company" and those for (b) obtaining a suspension and modification for a "rural carrier." The comments, citing *Connecticut Office of Consumer Counsel v. AT&T Communications,* 4 FCC Rcd 8130, 8133 (1989) *aff'd sub nom. Connecticut Office of Consumer Counsel v. FCC,* 915 F.2d 75 (2d Cir. 1990), *cert. denied,* 11 S. Ct. 1310 (1991), actually support petitioner's position that Commission policy places the burden of proof on the movant or complainant.[16]

B. Petitioners' Request for a Stay of 7 C.F.R. § 51.405 Satisfies the Remaining Criteria of Holiday Tours.

Petitioners will suffer irreparable harm if these rules become effective prior to judicial review. The invalid burden of proof and standards requirements substantially increase the probability that the exemption will be terminated. Such unjustified loss of exemption is, by itself, irreparable harm. Compliance with the rules will require rural telephone companies that

---

[14] May 16, 1996 Comments of the Small Cable Business Association at 17.

[15] May 16, 1996 Comments of Vanguard at 40.

[16] Vanguard Comments at 41, note 78.

are members of the associations to immediately prepare for potential challenges to their exemptions. As explained in the attached affidavit of Lawrence C. Ware, a rural telephone company faced with a bona fide request will need the services of attorneys, cost consultants and economists to meet the "extraordinary undue economic burden" and burden of proof rules unlawfully adopted by the Commission.. The expense and distraction of company personnel will substantially exceed that contemplated by the statute. The 120 day time frame for disposition of an inquiry combined with the September 30, 1996 effective date of the Commission's order effectively requires rural telephone companies to incur substantial costs immediately. If the Commission's rules are ultimately overturned, these costs will have been incurred for naught, at least for the majority of rural telcos who would be expected to meet a properly formulated statutory standard, but not the Commission's erroneous standard. The public interest will not be served by this waste of resources. Nor can small LECs tolerate the expense and distraction to the same extent as larger LECs. Furthermore, in a competitive environment, the remaining customers of rural telephone companies will be harmed unnecessarily if they are required to pay for these unnecessary costs.

Application of the "extraordinary undue economic burden" standard during the pendency of judicial review will cause the companies and their rural customers to suffer irreparable harm. The wrongful standard would force State commissions to ignore the universal service provisions of the Act and the universal service rules that may be adopted prior to the conclusion of judicial review. As a result of the rule, State commissions will be required to pretend that there are no differences between the high cost areas served by rural telephone companies and any other part of the state. The States will also be required to ignore the effect these terminations might have on the rates for services in high cost areas as well as continued access to telecommunications and advanced services. Application of a standard that writes out universal service is highly likely to injure rural companies, which still have obligations to serve high cost and rural areas. The remaining customers of these companies will also likely suffer during the pendency of judicial review whenever a State commission is required to determine a termination on the basis of an erroneous standard that ignores service to all.

The announced purpose of the national interconnection rules is to handicap ILECs and facilitate CLECs: The Order (¶¶ 41, 55-62) explicitly pursues the goal of (a) reducing incumbent LEC bargaining power, (b) narrowing the range of options that may be negotiated, and (c) correcting for the LECs' purported incentives not to negotiate fairly. The law, however, provides for virtually unrestricted negotiating scope and does not authorize federal intervention to alter the balance of bargaining power or to substitute regulation for marketplace incentives.

Thus, any local exchange carrier that receives a bona fide request and is required to negotiate under the Commission's rules will be intentionally placed in an impaired bargaining position. The intention is the FCC's, not that of Congress. The ILEC will have to agree to artificially limited bargaining options, default prices and reduced cost recovery, as well as any part of any other interconnection agreement. Under the FCC's own presumption about the relative bargaining power of ILECs and CLECS requesting interconnection (¶ 41), the "agreement" will reflect the weight of the FCC's thumb on the bargaining scale. The harm will be worse for rural LECs, since Congress was well aware that they do not have the bargaining power of the large LECs or CLECs.[17]

Ordering rural LECs' to unbundle, collocate, resell at retail less "avoidable" costs,[18] and otherwise comply with non-exempt ILEC burdens will also break down their access relationship with AT&T and other interexchange carriers, regulate them pervasively, thus raising their expenses, and, in effect, force companies that have invested in and operated a customer service business to operate a business under rules mandating their primary responsibility as supplying inputs to other carriers. Rural LECs' will, thus, be forced out of a business regulated for consumers' well-being and into a more heavily regulated wholesale carrier's carrier business.

Failure to stay the Order's ultra vires regulation and alteration of the rural exemption and modification or suspension provisions would encourage CLECs to initiate "bona fide" requests in advance of any real intent to serve areas in order to benefit from the Order's skewed, pro-competitor burden of proof and extraordinary economic burden standard before a court can overturn them. Imposition of these unprecedented regulatory burdens would then require investment and upgrades that could not be undone when the court acts.

A stay of these rules pending judicial review will merely preserve the status quo and present no harm to the public and other interested parties. On the other hand, the public will be

---

[17] The Senate Report on S.652 explained the forerunner of the rural and mid-size relief provisions as a tool to "level [the] playing field, particularly when a company or carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial resources that are significantly greater than the [ILEC] company or carrier." Conf. Rep. at 119, (describing Senate rationale.)

[18] The 1996 Act, in contrast, specifies "avoided" costs in section 252(d)(3) (specifying retail rates, "excluding . . . other costs that will be avoided.")

harmed by implementation of rules that ignore the Congressional mandate to preserve and advance service in all areas of the country. Parties interested in competing with a rural telephone company retain their rights to interconnection, resale, number portability, dialing parity, access to rights of way and reciprocal compensation regardless of the section 251(c) exception.. They may also reach voluntary agreement under section 251(a) with rural telephone companies to establish interconnection agreements that include provisions that are embraced in section 251(c). These parties thus have other avenues to obtain what access they need from rural telephone companies. Any potential harm they might suffer during the pendency of judicial review is minor in comparison to the harm that the more than 800 individual rural telephone companies and their customers will suffer. A stay will prevent these companies from incurring substantial costs that may not be recoverable and in any event may not be necessary. The overall goal of local competition will not be hindered by a stay of this single aspect of the interconnection rules which affects the less competitive and desirable 5% of the Nation's access lines.

II. THE COMMISSION SHOULD STAY 7 C.F.R. § § 51.303 and 51.809.

A. Petitioners are Likely to Prevail on the Merits in Challenging the Order for Making ILECs' Existing Joint Provisioning Arrangements Unsustainable for Rural Telephone Companies.

The Order also, by federal fiat, sweeps longstanding agreements between neighboring ILECs under the 1996 Act's interconnection requirements, including "non-discriminatory" availability. What have traditionally been adjacent ILECs' arrangements to share responsibility for various non-competing services and functions such as Extended Area Service (EAS) and signaling for local and intrastate purposes, must now be filed as competing carrier interconnection agreements. 47 C.F.R. § 51.303. Upon state approval, the ILECs must make the agreements or any of their terms available to any requesting carrier under a "most favored nation" rule. 47 C.F.R. § 51.809. While permitting, but not requiring, ILECs to renegotiate their agreements to reflect the new competitive paradigm, the Order assumes states will reject arrangements incompatible with the new environment. The Commission summarily rejects record showings that (a) Congress has enacted a different regime for neighboring ILEC agreements involving rural telephone companies in section 259, the infrastructure sharing provision, and (b) the interconnection provisions were intended only for arrangements between competing carriers. It also ignores record showings that subjecting existing neighboring ILEC sharing arrangements to sections 251-52 would cause termination of EAS arrangements that are valued by consumers because they provide greater convenience and lower rates for calls between rural areas and the larger towns and cities with which they have "community of interest."

The RTC is likely to prevail on the merits in challenging the Order for making ILECs' existing joint provisioning arrangements unsustainable for rural telephone companies: The plain language of the Act and the intent of Congress are fundamentally at odds with what the Commission has done. The Act unambiguously endorses "reasonably comparable" rates and services in rural and urban areas. § 254(b)(3). Further, Congress enacted section 259, which confers on LECs that provide universal service and lack economies of scale the statutory right to request and obtain "infrastructure sharing" to provide functions, services and capabilities under quasi-joint provisioning arrangements with a larger ILEC. Such an arrangement would be filed with the Commission or the state commission under § 259(b)(7), but is explicitly exempted from "common carrier" treatment. § 259(b)(3). This evidences unmistakably the legislative intent to treat arrangements like these involving rural LECs with special care, outside the interconnection mechanism for competitors.

The Order flouts the regulatory scheme chosen by Congress. It directly jeopardizes existing neighboring ILEC arrangements, such as EAS and signaling relationships between large ILECs and the small and rural ILECs represented by the RTC, by making them into common carrier interconnection arrangements. These arrangements currently enable rural subscribers to have local exchange service (or its equivalent) to and from the population centers that typically serve as their commercial and service hubs. With EAS, a rural community's residences and businesses--like those in urban areas--can communicate with suppliers, doctors, social services, the Internet and other resources without toll calling and charges significantly higher than what urban users pay for similar calls. The Order explicitly recognizes (¶170) that these arrangements generally contain terms that will not be sustainable if marketplace forces prevail. Moreover, treating small and rural LEC agreements with their neighbors as subject to the filing and mandatory arbitration provisions of section 252 has the effect of repealing their statutory exemption without the state findings mandated by section 251(f)(1).

By extending the reach of its rules to include neighboring ILEC EAS and other arrangements, the Order (¶¶ 1321-23) also subjects them to its term-by-term "most favored nation" scheme. The Order's requirement for term-by-term availability adds to the enormous pressure towards repudiation or pervasive renegotiation of neighboring ILEC pacts.

Finally, the Order's determination that ILEC-to-ILEC shared provisioning agreements must now comply with the whole panoply of interconnection requirements flies in the face of the infrastructure sharing provision. The very arrangements Congress chose to preserve in that section will now be scrapped or rewritten--perhaps before the Commission even implements section 259 under the one-year statutory deadline. The Commission has, in effect, read section 259 out of the Act and substituted an interpretation with the opposite results. It is unlikely that a court could uphold the Commission's assertion of implied interconnection authority to defeat the goals and imperil arrangements Congress enacted section 259 to encourage.

The Order (¶ 119) brushes off the mandate of Section 259 "as a limited and discrete provision designed to bring the benefits of advanced infrastructure to additional subscribers. . . ." However, that pro-subscriber purpose has been ignored, solely to let competing carriers either claim the benefits of arrangements negotiated to benefit rural customers or to force their termination. The Order reasons (¶ 165) that the statute is clear about excluding preexisting pay phone agreements from the reach of section 276 (b)(3) and relies heavily (¶ 167) on the public filing requirement of section 252(i). The Order then inconsistently skips over (a) the express rural ILEC exemption in section 251 (f)(1), from all of 251(c), including the "duty to negotiate according to section 252" (section 251 (c)(1)) and, a fortiori, all further negotiation provisions of section 252; (b) the explicit separate mandate for large ILECs' cooperative use of infrastructure with essentially the same carriers the exemption targets; (c) the explicit exclusion of infrastructure sharing arrangements between "non-competing LECs' under section 259(b)(3), from "common carrier" treatment (*e.g.*, the section 251(b) and (c) and section 252 interconnection and nondiscriminatory availability provisions),[19] and (d) the inexplicable

[19] The Act's plain language encouraging non-competing ILEC arrangements to share infrastructure under section 259 belies the Order's presumption that encouraging neighboring

duplication of section 259(b)(7)'s public file requirement, if section 252 already requires filing and availability of all LEC-to-LEC agreements. The Commission's admission (¶ 170) that preexisting LEC-to-LEC agreements are likely to be unsuitable for the competitive marketplace is consistent only with excluding them from the reach of sections 251 and 252 when an automatically-exempt ILEC is a party. These glaring lapses in logic further illustrate how arbitrary and capricious is the Order's decision to invoke section 252(i) and sidestep sections 251 (f) and 259.[20]

B. Mistaken Application of Section 251(c) and 252(i) to "Rural Telephone Companies" to Compel Filing and Unrestricted Availability of any Term in a Preexisting EAS Agreement will also Irreparably Harm Rural ILECs.

First, the Order admits (¶ 170) that neighboring ILEC agreements "were negotiated under very different circumstances," and may not be "viable in a competitive market." It also anticipates that states may reject EAS and other ILEC agreements. The record indicated that customers value EAS arrangements.[21] The most favorable agreements in terms of low rates, improved services and adequate rural ILEC compensation for shared service for adjacent service areas are just the agreements the Order is most likely to eliminate by ordering that section 259

LEC competition supports its overbroad reading of 251(i).

[20] The notion (¶ 169) that section 259 is meant only to extend advanced infrastructure to rural subscribers leaves section 706 of the 1996 Act unexplained and redundant.

[21] RTC Comments, CC Docket No. 96-98, p. 18, n.23 (filed May 16, 1996).

does not apply and that CLECs can demand the same arrangements to compete with ILECs in their own service area.[22]

Indeed, termination of many EAS arrangements is virtually certain because their terms are more favorable to rural customers and rural LECs than marketplace arrangements. Termination would immediately threaten higher rates, more toll calls, or both, for the affected rural customers. Even renegotiation is likely to terminate compensation arrangements with rural LECs to avoid extending them to CLEC rivals. The LECs will likely also lose other arrangements governing their relationship with larger LECs' or be forced to accept less-favorable terms dictated by the FCC's choice to apply section 251 rather than section 259.

Once existing agreements are terminated, neither the State commission nor the Commission can require reinstatement of current EAS rates, routes, local calling areas, the terms of signalling arrangements or other terms of existing agreements between ILECs. If sections 251 and 252 govern, common carrier treatment, carrier negotiations and "most favored nation" demands will apply, regardless of customer dissatisfaction. Moreover, carrier compensation arrangements under existing ILEC-to-ILEC agreements will not be subject to restoration if judicial review strikes down the Order's preemption of state authority and the rules concerning burden of proof, exemption standard and neighboring ILEC agreements.

---

[22] The Order actually attacks lower rates for rural carriers owing to an ILEC-to-ILEC agreement as a barrier to competition. It thus necessarily assumes that rural customers will benefit from higher rates.

Preserving existing ILEC-to-ILEC arrangements such as EAS agreements will not harm other parties. The Order's concern that potential competitors will be discouraged from competing in rural areas by artificially low rates (¶ 168) is speculative, since entrants target competition to large urban markets first. In any event, higher rates cannot be assumed to benefit the rural public. Customers deprived of current beneficial rates and terms made possible by universal service mechanisms are not likely to see the benefit, but will likely hold their ILEC universal service providers responsible. The Commission should not advance the interests of selective CLEC entrants or a theoretical gain in competition and consumer welfare at the expense of current customers' well-being. From the viewpoint of inter-ILEC agreements, moreover, the status quo is best preserved by allowing established arrangements to remain in effect, at least until the infrastructure sharing provision has been implemented.[23]

Given the emphasis on maximizing opportunities for competing carriers throughout the Order's section on existing ILEC agreements and the absence of any evidence that rural customers will experience benefits sufficient to outweigh the loss of local calling to their community of interest, the public interest equation is clear. Staying the application of sections 251 and 252 to agreements between rural telephone companies and neighboring ILECs will best prevent harm to the public interest.

Finally, the Order concedes at the outset (¶¶ 6-9) that the interconnection rules are only one piece of a policy puzzle that requires at least two more pieces -- universal service and access

[23] Although the Commission had announced that it would initiate rulemaking to implement section 259 by now, it has not yet released a proposal.